STATE OF MICHIGAN

COURT OF APPEALS

LARRY SZAMBELAN,

Plaintiff-Appellant,

v

NEW YORK LIFE INSURANCE COMPANY, JOHN ZORIO and RICHARD D. NEAL,

Defendants-Appellees.

UNPUBLISHED
March 23, 1999

No. 203156
Oakland Circuit Court
LC No. 95-490180 NO

Before: Sawyer, P.J., and Bandstra and R.B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm.

Plaintiff and New York Life Insurance Company entered into a Field Underwriter's Contract, which was effective after May 27, 1978. Pursuant to correspondence dated March 1, 1994, plaintiff received notice that his Field Underwriter's Contract was canceled effective March 31, 1994. Plaintiff filed a complaint against defendants alleging age discrimination, handicap discrimination, breach of contract, and intentional infliction of emotional distress. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence available to it. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). We review the grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

First, plaintiff argues on appeal that the trial court erred in ruling that he was an independent contractor and not an employee, and as a result, granting summary disposition to defendants on plaintiff's claims under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(110) *et seq*. However, in order to maintain these claims against defendants, plaintiff must have been an "employee" of defendants, rather than an independent contractor. The definitions of "employee" and "employer" under the civil rights acts do not assist this Court in determining whether plaintiff was an employee of defendants. See MCL 37.1201(a) & (b); MSA 3.550(201)(a) & (b); MCL 37.2201(a); MSA 3.548(201)(a).

In *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 647; 364 NW2d 670 (1984), our Supreme Court indicated that the economic reality test was the appropriate test to be used to determine whether an employee-employer relationship existed in a case like this.[2] Under the economic reality test, the totality of the circumstances surrounding the performed work is analyzed. Control of the worker's duties should be considered, as well as payment of wages, authority to hire and fire, and the responsibility for the maintenance of discipline. *Id.* at 648, quoting *Farrell v Dearborn Mfg Co*, 416 Mich 267, 276; 330 NW2d 397 (1982), quoting *Schulte v American Box Bd Co*, 358 Mich 21, 33; 99 NW2d 367 (1959).

After reviewing the facts and considering the factors of the economic reality test, we agree with the trial court that plaintiff was an independent contractor rather than defendants' employee. At the time of the termination of his contract with New York Life, plaintiff was licensed with nine insurance companies. Plaintiff built and equipped an office in the basement of his home from which he conducted all of his insurance business. Plaintiff deducted the expenses of his home office on his taxes. Plaintiff's compensation was earned by commissions, not salary or hourly wages. Plaintiff paid for coverage for his own mistakes and omissions. Plaintiff did not receive vacation or sick pay or personal leave time as did employees of New York Life. Plaintiff was not provided with any personnel staff by New York Life. Plaintiff paid all of the expenses associated with his solicitation of insurance. Plaintiff set his own hours and work schedules. He also chose whom he would solicit. Plaintiff had full control over the details of his insurance solicitation business. He was responsible for securing and maintaining the license he needed to sell insurance. Finally, plaintiff admitted in correspondence, that after a field agent finished his first three years as an apprentice, the agent was his own boss, made his own decisions, and set his own hours and goals.

Moreover, the Field Underwriter's Contract specifically states that no employee-employer relationship existed between the parties and that plaintiff was an independent contractor of New York Life who was "free to exercise his own discretion and judgment with respect to the persons from whom he will solicit applications, and with respect to the time, place, method and manner of solicitation and of performance hereunder." Even the benefits agreement specifically stated that plaintiff, as a field underwriter, was "in business for himself," was "his own master," and was "free to operate without direction or control by the Company as to the persons from whom he . . . solicit[ed] applications and as to the time, place, method and manner of solicitation and of performance under such contract."

These facts overwhelmingly show that plaintiff was not controlled by defendants as to the method he used in his insurance solicitation business, but only as to the result to be accomplished. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). Contrary to plaintiff's argument, minimum performance standards set by defendants relate to the results plaintiff had to achieve, not the method he was required to meet the performance standards. The totality of the circumstances surrounding the work performed show that plaintiff was an independent contractor. In fact, it appears from the testimony and the contracts that New York Life made a great attempt to ensure that its agents were in fact independent agents and not employees and that they considered themselves to be so. Therefore, we conclude that plaintiff has not set forth specific facts showing that there was a genuine issue for trial regarding whether he was an employee of defendants under either the Elliott-Larsen Civil Rights Act or the Handicappers' Civil Rights Act. Because plaintiff concedes that independent contractors are not covered under the Michigan Handicappers' Civil Rights Act and the Elliott-Larsen Civil Rights Act, summary disposition was appropriate on these claims.

Plaintiff also argues that the trial court erred in determining his contract was terminable "at will" upon notice. We disagree. "[T]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *First Sec Sav Bank v Aitken*, 226 Mich App 291, 320; 573 NW2d 307 (1997), quoting *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209; 224 NW2d 53 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). If the text of the contract is unambiguous, the "parties' intentions must be ascertained from the plain, ordinary meaning of the language" of the contract. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). "A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation." *Id.* If the language of the contract is clear, construction of the contract is a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). "Parol evidence is not admissible to vary a contract that is clear and unambiguous." *Id.* at 722. It is only "admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract." *Id.*

Provision 9 of the Field Underwriter's Contract stated the following:

> Either party hereto may, with or without cause, terminate this contract upon written notice, said termination to become effective thirty days after the day on which such notice is dated.

Plaintiff's written contract clearly indicates that either plaintiff or New York Life could terminate the Field Underwriter's Contract with or without cause. The language of the contract is not susceptible to more than one interpretation. New York Life clearly had the authority under the contract to terminate the contract with or without cause upon proper written notice to plaintiff. The Nylic No. 6 plan, which provides a system of benefits for field underwriters who complied with the conditions and rules of Nylic No. 6, is parol evidence that is not admissible to vary the Field Underwriter's Contract because the Field Underwriter's Contract is clear and unambiguous. Moreover, provision 13 under the "General Rules" of the Nylic No. 6 plan indicates that the Field Underwriter's Contract controls over the Nylic No. 6 plan.[3]

Plaintiff argues that by breaching the statement in the Nylic No. 6 document that "[n]o change shall be made which increases the amount of new insurance which a member of Nylic, in good standing under the conditions and rules of Nylic, shall be required to effect in order to maintain membership . . . ," defendants were no longer able to terminate the Field Underwriter's Agreement. We disagree. Even if defendants did violate a term of the Nylic No. 6 agreement, this would not affect defendants' ability to terminate plaintiff.[4] Under the Field Underwriter's Agreement, either party was allowed to terminate the agreement with or without cause. Nothing in Nylic No. 6 changes or modifies this term. Therefore, the trial court did not err in ruling that the Field Underwriter's Contract was terminable at will by either party upon proper written notice.

Finally, plaintiff argues that the trial court erred in summarily disposing of his claim for intentional infliction of emotional distress. The four elements of this tort are: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). Recently, this Court in *Auto Club Ins Ass'n v Hardiman*, 228 Mich App 470, 475-477; 579 NW2d 115 (1998), confirmed that Michigan had recognized intentional infliction of emotional distress as a separate cause of action. However, "[d]amages for intentional infliction of emotional distress are not recoverable in an action for breach of an employment contract." *Stopczynski v Ford Motor Co*, 200 Mich App 190, 196-197; 503 NW2d 912 (1993). Damages for the intentional infliction of emotional distress may be awarded where there is allegation and proof of tortious conduct independent of the breach of contract. *Phinney v Perlmutter*, 222 Mich App 513, 531; 564 NW2d 532 (1997).

The actions plaintiff claims were extreme and outrageous included defendants' alleged discriminatory actions and procedures, denial of assistance by his managers in meeting his quotas, unfair criticism, and numerous letters from defendants indicating that if he did not improve his production, his Field Underwriter's Contract would be terminated. We do not find any of these actions "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush*, *supra* at 234. Therefore, the trial court properly granted defendants summary disposition on plaintiff's claim for intentional infliction of emotional distress.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

[1] Although defendants' motions for summary disposition were brought under both MCR 2.116(C)(8) and (10), it is apparent from the trial court's opinion that it considered evidence outside of the pleadings. Therefore, although the trial court did not indicate whether it granted summary disposition under MCR 2.116(C)(8) or (10), we assume it was granted under MCR 2.116(C)(10).

[2] Cf. *Hoffman v JDM Associates, Inc*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995) (the economic reality test is to be applied in cases involving employer-employee issues, while the control test

is to be applied in tort cases involving vicarious liability); *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 335 NW2d 106 (1983) (economic reality test applied, rather than the control test, to determine the existence of an employment relationship under the Michigan no-fault act).

[3] Provision 13 provides that "[t]he termination of the Field Underwriter's Contract of any member of Nylic, whether with or without cause, prior to becoming a Senior Nylic, shall automatically terminate his Nylic membership." We also note that there is no dispute in this case that plaintiff was not a Senior Nylic prior to his termination.

[4] In *Barnhart v New York Life Ins Co*, 141 F3d 1310, 1315 (CA 9, 1998), a case virtually identical factually to our case, the plaintiff raised the same argument as instant plaintiff, i.e., that New York Life imposed minimum production standards, not required in its original contract, which ultimately resulted in the termination of the plaintiffs. In affirming the grant of summary disposition to New York Life on this issue, the court stated that even if the plaintiff's "failure to meet minimum production standards is an inadequate cause for terminating the contract, presumably New York Life is still free to terminate the contract for no cause whatsoever." *Id.* We agree with this statement.